

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of

Acceleration of Broadband Deployment
Expanding the Reach and Reducing the Cost
of Broadband Deployment by Improving
Policies Regarding Public Rights of Way and
Wireless Facilities Siting

WC Docket No. 11-59

**COMMENTS OF LOUISVILLE/JEFFERSON
COUNTY METRO GOVERNMENT**

Louisville/Jefferson County Metro Government, a consolidated local government in Kentucky (hereinafter referred to as “Louisville” or “City”), files these comments in response to the Notice of Inquiry (“NOI”), released April 7, 2011, in the above-entitled proceeding. Through these comments, Louisville seeks to provide the Commission with basic information regarding its local rights-of-way and facility management practices and charges¹. The Commission should not interfere with these local policies.

INTRODUCTION

Louisville is known primarily as the home of Churchill Downs, the Kentucky Derby, and the Louisville Slugger bat. However, one of our major corporate citizens, UPS, is more relevant to the discussion of the use and regulation of rights-of-ways. UPS is all about logistics – how to get things where they need to go as efficiently,

¹ We use the term “charges” to include both any cost recovery that is part of rights-of-way and facility management (such as permitting fees), as well as other compensation we may receive from utility companies that are franchised in accordance with state laws (hereinafter referred to as “franchisees”), including communications companies, for the use of the rights-of-way and other facilities consistent with state and local law.

effectively, and quickly as possible. Controlling the use of rights-of-way is a logistics problem. There are many different users with different needs trying to provide many different services within the same small area of publicly held property. While UPS can control what routes it uses to accomplish its purposes, Louisville is constrained by the use of rights-of-way that were designed primarily for transportation purposes. The use of rights-of-way by utilities was secondary to the transportation use. In Louisville, some utilities are placed under the road bed where actual traffic goes over it every day. Other utilities are placed next to the road either underground or above ground, but are positioned in property owned in fee simple by the City, dedicated as right-of-way in a plat, by an individual property owner, or other means.

Louisville has developed considerable expertise applying its rights-of-way policies to protect and further public safety, economic development, and other community interests. By adopting rules on the use of rights-of-way for broadband deployment, the Commission could disrupt this process at substantial cost to local taxpayers and to the local economy, as well as to the other users of the rights-of-way. We believe that a basic respect for federalism, a fair reading of the Constitution and the Communications Act, and an honest assessment of the Commission's limited expertise on local land use matters and use of rights-of-way all point to the same conclusion: this is no place for federal regulation.

Louisville has successfully managed its property to encourage deployment of broadband networks. As a result, 4 Mbps broadband service is available to 91% of

the households in our jurisdiction². There is no evidence that our policies or charges with respect to placement of facilities in the rights-of-way or on City property have discouraged broadband deployment. Our community welcomes broadband deployment, and our policies allow us to work with any company willing to provide service.

Louisville particularly knows the value of broadband to our community as our 18 public libraries have provided 928,000 individual internet sessions to members of the public in the last twelve months, through more than 650 public computers. Those internet sessions are provided by Louisville; they are not provided by a broadband provider as part of a franchise agreement or an “in-kind” service.

Louisville also takes advantage of the benefits of sharing resources both to and from broadband providers as Louisville has one tower that allows the collocation of two cellular providers and Louisville collocates its antennas on 8 cellular towers and 2 cable system towers.

Louisville has a policy on the use of its rights-of-ways that applies to all entities that use the rights-of-way (hereinafter referred to as “franchisees”), such as for cable, telecommunications, telephone, gas, electric, sewer, and water service. Because the rights-of-way are used by so many different franchisees, with sometimes entirely different needs and processes, it is a public safety imperative that this work be coordinated locally to prevent inconsistent uses and disruptions. We believe our policies have helped to avoid problems and delays in broadband deployment by ensuring that broadband deployment, and the use of the rights-of-way by all franchisees, goes

² <http://www.broadband.gov/maps/availability.htm>

smoothly and in the greater interest of public safety. On the other hand, if all entities seeking access to our rights-of-way and facilities did not follow Louisville’s rules or regulations, it would be to the great detriment of franchisees, abutting landowners, commuters, businesses, Louisville, and the general taxpayer.

In response to the NOI, Louisville provides the following information:

I. Application Procedures, Forms, Substantive Requirements, and Charges.

The Commission asks whether all necessary application procedures, forms, substantive requirements, and charges are readily available.³

Louisville has a Louisville Metro Public Works and Assets Utility Policy (hereinafter referred to as “Utility Policy”), that governs use of rights-of-way. The Utility Policy is available on the City’s website, and in City offices. Any work within the rights-of-way that disturbs the pavement, curb and gutter, driveway entrances, sidewalk, landscaping or grassy areas, and any work that blocks a normal traffic lane, requires a permit. The requirement of the permit facilitates the need for Louisville to:

- coordinate all franchisees that use the rights-of-way;
- maintain a record of street cuts, patches, and replacement so franchisees responsible for such work are also responsible for any subsequently needed repairs to the rights-of-way, public and private property caused by its permitted actions in the rights-of-way;
- inspect to ensure that standards of work and safety for workers in the rights-of-way are maintained at a level designed to protect the public and

³ NOI ¶14.

meet federal, state, and local requirements;

- minimize traffic disruptions and keep streets open to protect the safety of the motoring public, bicyclists, and pedestrians;
- to ensure that public safety is maintained and that public inconvenience is minimized by establishing time constraints for utility work, and response time to utility repairs to pavement;
- take into consideration traffic needs of the local community, including such large scale events as the Kentucky Derby, Thunder over Louisville, the Derby Marathon and Mini-Marathon, Derby Parade, Derby Boat Race, St. James Art Fair, Light Up Louisville, Ironman Triathlon, and neighborhood parades; and
- provide notices to public safety agencies when streets are closed, detoured around, or limited access, so that police, fire, emergency medical services, and other public safety agencies can provide their services in a timely manner.

A few statistics may assist in the understanding of just how active Louisville is in the management of its rights-of-ways. In 2010, there were 4,885 permits issued for actions to be taken in the rights-of-way. In 2011 to date, there have been 2,344 permits issued for actions to be taken in the rights-of-way. This includes, but is not limited to, special events, parades, curb cuts, entire street closures, lane or sidewalk closures, resurfacing, and utility cuts.

II. Sources of delays.

The Commission asks what factors are chiefly responsible to the extent applications are not processed in a timely fashion. The Commission also asks about errors or omissions in applications.⁴

In Louisville, most applications are processed very quickly. In most cases, if the applicant provides all the needed materials for the issuance of a permit, the permit is issued within one day. However, in very large projects that require the review of engineering plans, this can take up to one week. Most telecommunications and cable permits are able to be issued within one day. A major factor in the delay of the issuance of a permit is that the applicant does not supply all the information or materials needed to issue a permit.

III. Improvements.

The Commission asks whether there are particular practices that can improve processing.⁵

Louisville has recognized a number of practices that have improved the permitting process. Louisville is currently working on updating its Utility Policy. Currently, a draft has been shared with franchisees for their review and comment. A monthly meeting for franchisees is also starting to allow franchisees to review and discuss rights-of-way issues, both with each other, and well as with the City. Louisville also has employees that can go out in the field to meet with a franchisee if an unforeseen condition or problem occurs while working with a permit. Having personnel available prevents delays in returning rights-of-way to service. Louisville has attempted “single

⁴ *Id.*

⁵ NOI ¶¶ 14, 29.

dig” or joint trenching processes, but has found that the majority of the issues are between the franchisees, rather than between a franchisee and the City.

When major work is being planned by the City, it will send an email blast out to franchisees to advise them of the work that will be done and asking if the franchisee has any facilities within the work area that need to be relocated. Inevitably, at least one franchisee will ignore the request and then at the last minute the City project has to be delayed to allow the franchisee to relocate facilities. Additionally, the City usually deals with a franchisee or contractor, and then a subcontractor does the actual work in the rights-of-way. Often a subcontractor will try to save money by not specifically following the policies and then the City requires the subcontractor to redo the work in accordance with the Utility Policy, which causes a delay.

IV. Permitting Charges.

The Commission seeks data "on current permitting charges, including all recurring and non-recurring charges, as well as any application, administrative, or processing fees." Specifically, the Commission asks commenters to identify:

- the type of facilities for which such charges are assessed;
- how such charges are structured (e.g., per foot or percent of revenue in the case of rights of way fees);
- whether the community is subject to comprehensive state franchising or rights-of way-laws;
- whether the charges are published in advance or individually negotiated, designed to approximate market rates or merely recover costs (direct and/or indirect), and accompanied by comprehensive terms, and conditions; and
- the value of any in-kind contributions required for access or permit approval.

The Commission further asks whether such charges are related to impacts on the local community, such as pavement restoration costs for projects that involve trenching

in roadways.⁶

In Louisville, a permit is required for a lane closure, sidewalk, parking on meters, or any work in the rights-of-way, at a flat fee of \$25 per week. A one-time excavation fee of \$100 is charged for any excavation activity in the pavement, sidewalk, or dirt. A degradation of the pavement fee is charged for any cuts made to pavement. This fee is charged based on the area using a formula of Width multiplied by Length divided by 2 multiplied by \$.50 a square foot. When milling and paving are required, this degradation fee is waived. When utility cabinets are placed in the rights-of-way, a one-time fee of \$200 is charged. Temporary “No Parking Any Time” signage can be purchased at \$1.50 each.

All fees are posted on-line and in the Utility Policy. Most fees are collected up front when a permit is applied for, but some franchisees are billed monthly for permits. No fees are individually negotiated. Fees are set as an attempt to cover actual costs for the permitting process. The Utility Policy does not address the location of facilities on City owned property other than in the rights-of-way. Any collocation of utility equipment on City owned property, other than the rights-of-way, is individually negotiated, as are all leases for City owned property.

Louisville does not require any in-kind contributions required for access or permit approval. It only requires that permitted rights-of-way be put back into the same condition as they were prior to the permitted work, and in accordance with federal, state, and local laws.

⁶ NOI ¶ 17.

Kentucky does not have state franchising laws other than a constitutional provision which requires utilities to obtain the consent of the proper legislative bodies to use its streets, alleys or public grounds,⁷ that franchises be competitively bid and may not be for longer than 20 years,⁸ may not be exclusive,⁹ and telecommunications services franchise fees have been replaced by the telecommunications Excise Tax since 2006.¹⁰

V. Local Policy Objectives.

The Commission asks what "policy goals and other objectives" underlie the local practices and charges in this area.¹¹

In Louisville, our policies are designed to achieve the following:

- facilitate the responsible deployment of services;
- make all public services, including broadband telecommunications broadly-available;
- ensure public safety;
- avoid traffic disruption;
- maintain and repair roadways;
- prevent public disruption and damage to abutting property;

⁷ Kentucky Constitution Section 163 provides: No street railway, gas, water, steam heating, telephone, or electric light company, within a city or town, shall be permitted or authorized to construct its tracks, lay its pipes or mains, or erect its poles, posts or other apparatus along, over, under or across the streets, alleys or public grounds of a city or town, without the consent of the proper legislative bodies or boards of such city or town being first obtained; but when charters have been heretofore granted conferring such rights, and work has in good faith been begun thereunder, the provisions of this section shall not apply.

⁸ Kentucky Constitution Section 164 provides: No county, city, town, taxing district or other municipality shall be authorized or permitted to grant any franchise or privilege, or make any contract in reference thereto, for a term exceeding twenty years. Before granting such franchise or privilege for a term of years, such municipality shall first, after due advertisement, receive bids therefor publicly, and award the same to the highest and best bidder; but it shall have the right to reject any or all bids. This section shall not apply to a trunk railway.

⁹ KRS 96.030.

¹⁰ KRS 136.660.

¹¹ NOI ¶ 22.

- minimize accelerated deterioration to roads that accompanies street cuts;
- satisfy aesthetic, environmental, historic preservation concerns; and
- to avoid damage to the property of others.

VI. Possible Commission Actions.

Finally, the Commission asks what actions the Commission might take in this area.¹²

As noted above, Louisville strongly urges the FCC to refrain from regulating local rights-of-way management and facility placement processes. These are highly fact-specific matters, which turn on local engineering practices, local environmental and historical conditions, local traffic and economic development patterns, and other significant community concerns and circumstances. These matters are managed by local staffs with considerable expertise. Imposing a federal regulatory regime would create unnecessary costs for our community, create confusion with other franchisees using the rights-of-way, and it would have the potential to undermine important local policies. Likewise, Commission regulation of charges for use of the rights-of-way could have significant impacts on the community, and may actually make it infeasible to continue to maintain or provide important public services.

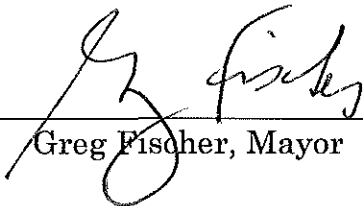
If the Commission feels compelled to act in this area at all, it should limit itself to voluntary programs and educational activities, and to implementing its own recommendations in the National Broadband Plan for working cooperatively with state and local governments.

¹² NOI ¶ 36.

CONCLUSION

Louisville urges the Commission to conclude that rights-of-way and facility management and charges are not impeding broadband deployment. As indicated above, in Louisville, our policies and procedures are designed to protect important local interests, and have done so for many years. There is no evidence that the policies have impaired any company from providing broadband service here, and there are many reasons to believe that federal regulations would prove costly and disruptive to our community.

Respectfully submitted,
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By:  _____
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